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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. IDELFONSO ESPARZA, Defendant and Appellant.	F061144 (Madera Sup. Ct. No. MCR027745B) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Mitchell C. Rigby, Judge.

Jerome P. Wallingford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On April 20, 2010, a jury returned verdicts finding appellant Idelfonso Esparza guilty in count 1 of murder in the first degree (Pen. Code,[1] § 187, subd. (a)), in count 2 of unlawful discharge of a firearm from a motor vehicle (§ 12034, subd. (c)), and in count 3 of actively participating in a criminal street gang (§ 186.22, subd. (a)). As to counts 1 and 2, the jury found numerous special allegations to be true.[2]

On October 14, 2010, the court sentenced appellant to a term of life in state prison without possibility of parole on count 1 and imposed a consecutive term of 25 years to life for the special allegation of discharging a firearm causing death (§ 12022.53, subd. (d)). The court stayed the imposition of sentence on counts 2 and 3 (§ 654). Appellant filed a timely notice of appeal the following day.

STATEMENT OF FACTS

On the afternoon of April 5, 2004, Madera County Sheriff's Lieutenant Michael Salvador was driving eastbound on 5th Street approaching Gateway Drive in the City of

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] As to count 1, the jury found the offense was committed by an active member of a criminal street gang in furtherance of the activities of the gang (§ 190.2, subd. (a)(22)) committed by discharging a firearm from a motor vehicle (§ 190.2, subd. (a)(21)) for the benefit of the street gang (§ 186.22, subd. (b)(1)(C)) with a principal personally and intentionally discharging a firearm causing great bodily injury and death to the victim (§ 12022.53, subds. (d), (e)(1)) and personally and intentionally discharging a firearm (§ 12022.53, subd. (c)), and personally using a firearm (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (e)(1)).

As to count 2, the jury found the offense was committed for the benefit of the street gang (§ 186.22, subd. (b)(1)(C)) with a principal personally and intentionally discharging a firearm causing great bodily injury and death to the victim (§ 12022.53, subds. (d), (e)(1)) and personally and intentionally discharging a firearm (§ 12022.53, subd. (c), (e)(1)), and personally using a firearm (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (e)(1)).

Madera. Lieutenant Salvador stopped at the intersection and prepared to turn onto Gateway. He heard three gunshots in rapid succession. Salvador looked south and saw two individuals run across the street toward a late model Dodge Intrepid parked near a feed store.

The two individuals entered the vehicle. One of them, a heavyset, bald, Hispanic male, climbed in the window on the passenger side. The Intrepid proceeded northbound, and Salvador unsuccessfully attempted to pursue the vehicle. He returned to the area where the Intrepid had been parked. Several witnesses pointed to a cell phone and a piece of paper on the ground and said the items belonged to the car that had just left. Salvador contacted the Madera Police Department for assistance.

Madera Police Officer Kristine Sauceda went to the scene shortly after Salvador heard the shots. She saw two brass nine-millimeter shell casings near the double yellow line on Gateway Drive in front of the feed store. The casings were "RP" brand. Sauceda also saw a silver cell phone and two folded pieces of paper on the ground near the southwest corner of the feed store. The papers were money order receipts in the sums of $175 and $500. Law enforcement officers later determined the victim of the shooting had used the money orders to pay rent at a realty office across the street.

Madera Police Officer David Herspring spoke with Evie Morfin, an employee of a property management firm inside the realty office. Morfin said the victim of the shooting, George Ganas, was a tenant of the property management firm and had come into the office to pay his rent. After he left the office, Morfin heard two gunshots. She looked out the window of her office and saw an individual getting into the passenger side of a vehicle parked in front of the feed store. The individual was holding his hand to his back, and the vehicle left on Gateway and headed towards 4th Street at a high rate of speed.

At about 1:45 p.m. that day, Madera Police Sergeant Giachino Chiaramonte went to Madera Community Hospital to follow up on a dispatch about a possible shooting victim. Sergeant Chiaramonte went to a room where medical staff members were treating George Ganas, who had sustained a gunshot entry wound to his lower back and had large, fresh abrasions on his left elbow and palm. Sergeant Chiaramonte saw Rick Gallegos pacing in the waiting room.

At about the same time, Madera Police Officer Jason Dilbeck received a report that a shooting victim had died. Officer Dilbeck went to the crime scene and learned the passenger in the black Dodge Intrepid was Rick Gallegos, and Gallegos had gone to Madera Community Hospital. Dilbeck went to the hospital, but Gallegos had already departed. Dilbeck contacted dispatch and learned the shooting victim was the registered owner of a Dodge Intrepid. Dilbeck broadcast a " 'be on the lookout' " request for the vehicle. A short time later, the sheriff's department reported that Rick Gallegos and the Intrepid were located behind a music store.

Dilbeck went to the location and saw the car with the driver's door open. A small amount of blood was present in the middle of the backseat. Lieutenant Salvador identified the vehicle as the one he observed leaving the scene. Officer Herspring noticed blood on the bottom portion of the back of the front passenger seat. He also noticed blood on the seat itself. He said the stains were consistent with someone bleeding from the back and sitting on the seat.

Herspring located a live nine-millimeter bullet wedged in the front passenger seat. He also saw an April 5, 2004, rent receipt from the realty office in the sum of $675, the total of the two money order receipts found at the shooting scene. In the backseat of the Intrepid, officers found a car seat, a television, and a prescription bottle containing marijuana. Herspring determined that George Ganas was the registered owner of the vehicle.

Stephen Avalos, M.D., a forensic pathologist, performed an autopsy on the body of George Ganas on April 9, 2004. He said the cause of death was "a gunshot wound of his trunk, which perforated his liver and grazed his lung and penetrated the left side of his heart." Avalos recovered the bullet from the victim's heart. Officer Dilbeck said the bullet was too deformed for testing, but its diameter was consistent with a nine-millimeter bullet.

On the afternoon of April 5, 2004, California Highway Patrol Officer Mark McAdams was driving westbound on 4th Street in Madera when he located a vehicle heading northbound on G Street at a high rate of speed. Officer McAdams slowed down to avoid a collision with the gray compact vehicle, which ran a stop sign at 45-50 miles per hour. McAdams activated his lights and siren and pursued the vehicle. The vehicle turned and accelerated as he approached.

Officer McAdams saw two individuals in the front seat and three in the back. The latter three appeared to be males with shaved heads. The vehicle went through a stop sign at Gateway Avenue and continued eastbound. McAdams slowed his patrol vehicle but continued in pursuit. The suspect vehicle stopped near an alley between D and E Streets. Three people exited the suspect car and ran down the alley. Officer McAdams did not have a clear view of them. McAdams drew his weapon at the middle rear passenger, C.A., and the driver of the vehicle, Rafael Rodriguez.

Officer Dilbeck went to the scene of the stop and obtained a statement from C.A., who Dilbeck said was 13 years old. C.A. said the shooter of George Ganas was known as "Poncho," "Bashful," and "Bash." He gave a physical description of Poncho and showed officers where the shooter lived. Officers compiled a photographic lineup that included appellant's picture. C.A. identified appellant as the shooter.

On April 9, 2004, Madera police officers executed a search warrant at the address on Cross Street that C.A. had tied to the shooter. Officer Dilbeck found an empty box of

nine-millimeter shells and appellant's social security card in the home. On April 22, 2004, Madera police officers went to Rafael Rodriguez's home, searched the premises, and seized four live nine-millimeter rounds. They also seized a photograph of gang members throwing gang signs and bearing gang writing. They also seized a letter written by a Vatos Locos Surenos (VLS) gang member form a prison in San Luis Obispo.

In July 2008, the Madera Police Department ran a "Crime Stoppers" advertisement in the Madera Tribune newspaper about appellant's arrest warrant. The advertisement included a photograph of appellant. In response to the ad, Virginia Yrigollen contacted Madera Police Detective Robert Hill and Detective Sergeant Robert Salas and provided information about appellant's current whereabouts, including a possible address for him. The address was located in Mexico. Detective Hill made a map of the area and faxed the information to the U.S. Marshal in San Diego. The Marshal Service apprehended appellant at the address supplied by Yrigollen and returned him to Madera on July 23, 2008.

Yrigollen testified that she lived with her boyfriend, Felipe Franco, near Mexicali, Mexico in 2004. Their residence was about three and one-half miles from the U.S. border. She said her son, Michael Lopez, visited occasionally and that Franco was appellant's uncle. Both Yrigollen and Lopez testified that appellant goes by the nickname "Poncho." Yrigollen said appellant arrived at her home in June 2004 and stayed about a month. Appellant would also stay at his aunt's house in the Mexicali area. Yrigollen said appellant's mother, Maria de La Luz Perez, would come to Mexicali and leave money and groceries for appellant.

Yrigollen said she was a close friend of the mother of George Ganas. Yrigollen had known Ganas his entire life and knew he had been shot in Madera. In June 2004, Yrigollen asked appellant about the Ganas shooting, but appellant said he did not remember much. Appellant claimed he had been at home when some friends stopped by

to pick him up. Yrigollen said she stopped appellant from giving an explanation because she had a hard time believing his version of events. Yrigollen said she was shocked and upset and really did not want to know what had happened to Ganas. Yrigollen said appellant was making himself look bad by running and told him he should go back and clear matters up. Although appellant did not respond to her advice, Yrigollen said appellant looked at her and "he knew it needed to be done."

Michael Lopez said he knew appellant as the nephew of Yrigollen's onetime boyfriend, Felipe Franco. Lopez saw appellant in Mexico in June 2004. Lopez had known appellant for about 12 years and had been good friends with George Ganas since they were children. Lopez knew that Ganas had been shot and killed. Lopez testified, "My brother told me the story [of the homicide] when I was in Turlock, you know, and just pieces of it, but not the whole … no one knows the whole story, so he just told me what he knew."

In June 2004, Lopez and appellant had a fight after appellant made some comments about the Ganas shooting. Lopez said he and appellant were drunk on tequila at the time. Lopez did not think that appellant was aware of his friendship with Ganas. Lopez was under the impression that appellant was visiting in Mexico, but appellant said he had done something wrong. Appellant went on to tell Lopez "[t]hat it was a car full of guys and then [appellant] shot, and that was it." Lopez began to argue with appellant and Yrigollen and Franco came outside to intervene in the fight. Lopez told his mother, "He killed George."

At trial, C.A. testified on behalf of the prosecution. C.A. said he was 15 years old in 2004 and had known appellant several years. C.A. met appellant at appellant's house at least an hour before 1:30 p.m. on April 5, 2004. Rafael Rodriguez and two other individuals picked up appellant and C.A. from the house. Appellant got into the front passenger seat and C.A. got into the rear, middle seat. The group left appellant's house

and went to a mini-mart at the intersection of Gateway and Yosemite Avenues to buy gasoline.

At the mini-mart, C.A. saw two individuals he had never seen before. C.A. said he was affiliated with the VLS gang at that time. C.A. believed the two individuals at the mini-mart were members of the rival Norteno street gang, based on the way they looked at the occupants of Rodriguez's car and the music they played. C.A. said the two groups exchanged "bad looks" but no derogatory words. One of the individuals who sat in the rear seat with C.A. was a gang member known as "Calacas." C.A. described Calacas's gang affiliation as "southerner." Calacas went inside the mini-mart to pay for the gas, returned to the car, and said the two individuals were Nortenos. As the two individuals left the mini-mart, they displayed a Norteno hand sign with four fingers spread out.

C.A. said he was seated behind Rodriguez and appellant but did not remember hearing them say anything or see them make gestures. A few minutes later, the group in Rodriguez's car departed the store. Surveillance videos at the store depicted Rodriguez, Calacas, and George Ganas, along with the vehicles of Rodriguez and Ganas. The videos were filmed at about 1:40 p.m. on April 5, 2004. Appellant and C.A. did not get out of Rodriguez's vehicle while it was stopped at the store. When the car departed, appellant was still seated in the front passenger seat.

Rodriguez made a right turn and drove northbound on Gateway. As they drove up Gateway, C.A. saw one of the individuals who had been at the store. The man was crossing the street in front of them and walking toward the same dark vehicle C.A. had seen at the store. The car was parked in front of a feed store, and the man appeared to see them. He slowed down his pace while he was in front of Rodriguez's car. Rodriguez slowed his vehicle to avoid hitting the man. The man started to run from the front to the rear of Rodriguez's car and appeared to be "scared for his life." Appellant looked at Rodriguez, as if to obtain permission to shoot the man.

When the man was to the right of Rodriguez's car, he put his hands in the waistband of his pants, as if he were going to pull a weapon. A few seconds later, appellant began shooting. C.A. did not know where appellant got the gun because C.A. had not seen it before. C.A. said it looked like a semiautomatic nine-millimeter handgun. C.A. said appellant's entire arm was extended out of the window of Rodriguez's car. C.A. said the shooting victim was standing about 10 feet away from Rodriguez's car. He ran between Rodriguez's car and the side of the street toward his own car. C.A. said appellant fired as the individual ran past him. Appellant's arm was pointed to the side and back while he fired multiple shots. C.A. said he did not hear any shots other than those fired by appellant.

C.A. said the shooting victim ran from the front to the back of Rodriguez's car and was behind Rodriguez's car when C.A. heard the last shot. C.A. said the victim fell to the ground behind his own car. C.A. said Rodriguez's car was stopped during the shooting and there was traffic in front of his vehicle. After appellant fired the last shot, Rodriguez pulled his vehicle into the oncoming traffic lane and drove away.

After Rodriguez drove away, C.A. noticed a law enforcement car following them. Rodriguez stopped in an alley and the two passengers seated in the rear with C.A. ran away. C.A. and Rodriguez stayed in the car until an officer ordered them out. C.A. said he spoke with officers, told them what happened, and identified where appellant lived. C.A. said he was concerned about retaliation against his family. C.A. also said he received no promises from the office of the district attorney in exchange for his testimony.

Officer Dilbeck testified he was a member of the Madera Community Response Unit and qualified as a criminal street gang expert without objection. Dilbeck said the VLS criminal street gang is a subset of the Surenos, who operate under the direction of the Mexican Mafia prison gang. Officer Dilbeck described four predicate offenses

committed by VLS members. In his opinion, the conviction of VLS members for these predicate offenses demonstrated a pattern of violent gang conduct by the Surenos. Dilbeck also concluded that appellant is a member of the VLS criminal street gang. He based his opinion on the facts of this case and police reports relating to appellant's participation in previous gang-related altercations, such as gang-related fights in September 1998, February 1999, and October 1999.

Officer Dilbeck also described a number of gang-related criminal offenses involving appellant, including a November 1999 petty theft accusation; an April 2001 traffic stop; a February 2003 traffic stop in which appellant fled and was caught in possession of methamphetamine; a March 29, 2004, traffic stop; and an undated incident in which he and another gang member were assaulted by perpetrators dressed like Nortenos.

Officer Dilbeck also based his opinion about appellant's gang membership on appellant's self-identification as a VLS gang member. During his July 23, 2008, booking in this case, appellant indicated he was a "southerner from VLS" and said his moniker was "Little Bashful." Appellant also identified himself as a Sureno gang member during a 2003 custodial classification.

In Dilbeck's opinion, George Ganas was a Norteno gang member who associated with other Nortenos on a regular basis. Dilbeck said Ganas had problems with VLS members prior to April 2004. The VLS members had chased Ganas on several occasions and on one occasion the VLS members "jumped" Ganas at a park. He concluded "there was a rivalry between them."

Defense Evidence

Appellant testified on his own behalf and said he did not shoot or kill George Ganas. Appellant said he was at his mother or girlfriend's home on April 5, 2004. In 2004, he lived in Susanville with his sister and brother-in-law. Appellant said he stayed

with them for several months while he attended a semester of college. Appellant said his goal was to become a mechanic. Appellant said he held a part-time job at a fast food store and played soccer.

During his semester in Susanville, appellant returned to Madera periodically and would stay with his mother or his girlfriend, Melissa. Appellant said he did not contact Madera friends who were gang members because he did not want to get into any more trouble and knew he would be in violation of his probation if he associated with them. Appellant said on one occasion he was walking from his mother's home to Melissa's home and some gang members tried to pick him up. When appellant told them he did not want to go with them, the gang members called him names.

Appellant said that after gang members knew he was in town, they would go to his mother's house to look for him. Appellant said he was scared of them because they always traveled in groups. He became angry when they arrived at his mother's home, and he told his mother to tell them he was not at home. Appellant began to go to his girlfriend's home to avoid them.

Appellant said his mother gave him a hard time for associating with gang members. Appellant's mother, Maria de la Luz Perez, testified that gang members beat appellant up. After they did so, she decided to take appellant to live with her father in Mexico. Appellant did not like the idea, but he knew he was in danger in the Madera area, and it would not be easy for him to leave the gang.

Mrs. Perez testified she took appellant to his grandfather's home in San Felipe, Mexico about one month before police searched her home on April 9, 2004. At that time, she did not know anything about the Ganas shooting. During the April 9, 2004, search of

her home, she told police officers that appellant was staying with her father in Mexico.[3] After appellant lived with his grandfather for about three months, his mother took him to live with her brother, Franco, and his girlfriend, Yrigollen. Mrs. Perez said she periodically visited Mexico and provided appellant with money and a car.

Appellant testified he lived with his uncle for several months. At that point, Yrigollen asked appellant, " 'Why are you here [in Mexico] after so many months later?' " He said, "I told her that … because of the gangs coming around looking for me, and my mom didn't approve. I obviously didn't want to have nothing to do with it." Appellant said Yrigollen always cut him off before he could finish his explanation. She would tell appellant, " 'No. Stop right there,' " and would not let him finish what he was trying to say. Appellant said he did not tell Michael Lopez that he shot George Ganas. At one point in time, Lopez got drunk on tequila and began accusing appellant of killing Ganas. Appellant said he does not drink tequila and did not get "wasted" with Lopez by drinking tequila. However, he admitted getting drunk with Lopez on beer.

The victim's sister, Alexandra Ganas, testified for the defense. At 7:00 a.m. on April 5, 2004, she was at her brother, George's, home. He gave her a ride to the convalescent home near the music store where their mother worked, so Alexandra could pick up her mother's truck. When they arrived at the convalescent home, Alexandra asked her brother for some money for gas for the truck. Alexandra said Ganas reached under the seat of his car and pulled out a metal box. The box contained rent money, a gun, and two bags of marijuana. Ganas removed the gun from the box to get access to the money.

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[3] According to Madera Police Officer Michael Powell, one of the officers who conducted the search, Mrs. Perez said she did not know appellant's exact whereabouts but indicated he had been in New Mexico for about three weeks.

Alexandra learned of her brother's death later that day. She returned to the convalescent home to pick up her mother, who got off work between 2:30 and 3:00 p.m. Rick Gallegos was at the convalescent home and "yell[ed] that George had been shot and to get to the hospital."

DISCUSSION

I. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY SUA SPONTE ON WHETHER A MINOR TRAVELING IN APPELLANT'S VEHICLE WAS AN ACCOMPLICE TO THE CRIMES.

Appellant contends the trial court violated his constitutional right to have every fact determined by the jury when it failed to instruct the jury sua sponte that the jury was required to determine whether C.A. was an accomplice to the crime.

A. Appellant's Specific Contention

Appellant submits the expert testimony of Officer Dilbeck supported the idea that C.A. was an accomplice. Dilbeck testified that on the day of the homicide, appellant was in Rodriguez's car with four other gang members, implying that C.A. was also a VLS member. Dilbeck said it is common for Surenos gang members to commit crimes together because it goes to the "fear aspect" of gang mentality. Dilbeck explained that people are afraid of gangs because they commit their crimes "in numbers." According to Dilbeck, gang members are emboldened to commit crimes of violence when they are together in numbers.

On appeal, appellant contends the trial court committed reversible error by not instructing the jury to determine whether C.A. was an accomplice. In appellant's view, there was evidence from which jurors could have found that C.A. was a gang member who knew the criminal purpose of the person who fired the shots and who provided encouragement and support for the shooting. Appellant further contends: "Had appellant's jury been properly instructed on principles for evaluating accomplice

testimony, jurors would have recognized that there was insufficient evidence to corroborate [C.A.'s] claim that appellant was the person who fired the fatal shots. Failure to properly instruct the jury on the corroboration requirement in section 1111 caused a miscarriage of justice."

B. Law of Accomplice Testimony

Penal Code section 1111 defines an accomplice "as one who is liable to prosecution for the identical offense charged against the defendant ...." The section further provides: "A conviction cannot be had upon the testimony of an accomplice unless it can be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

" ' "[W]henever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice,' " the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice. [Citation.] If the testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. [Citation.] In either case, the trial court also must instruct the jury, sua sponte, '(1) that the testimony of the accomplice witness is to be viewed with distrust [citations], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated ....' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

"Whether a person is an accomplice within the meaning of [Penal Code] section 1111 presents a factual question for the jury 'unless the evidence permits only a single inference.' [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 679.)

"[W]hen an accomplice is called to testify on behalf of the prosecution, the court must instruct the jurors that accomplice testimony should be viewed with distrust. [Citation.]" (*People v. Guiuan* (1998) 18 Cal.4th 558, 565.) In other words, the trial court has a sua sponte duty to instruct with CALCRIM No. 334 when warranted by the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 466.) The corroboration requirement of Penal Code section 1111 is a collateral factual issue, not an element of the charged offenses that must be proven beyond a reasonable doubt. (*People v. Frye* (1998) 18 Cal.4th 894, 967.) "[F]ailure to instruct on accomplice liability under [Penal Code] section 1111 is harmless if there was adequate corroboration of the witness." (*People v. Brown* (2003) 31 Cal.4th 518, 557.)

With respect to the standard of review, appellant initially acknowledges: "[T]he California Supreme Court has held instructions on the corroboration requirement in section 1111 do not define an element of the charged offense and thus do not involve the federal Constitution. (*People v. Frye*[, *supra*,] 18 Cal.4th [at pp.] 968-969, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 …." Appellant nevertheless contends: "Because accomplice status of a prosecution witness is intertwined with proof of the defendant's guilt, error in failing to instruct on those principles violates the federal Constitution, bringing the *Chapman* standard of harmless error analysis [*Chapman v. California* (1967) 386 U.S. 18] into play." "[T]he requirement under [Penal Code] section 1111 that 'a conviction cannot be had upon the testimony of an accomplice unless it be corroborated' is a matter of state law, which does not implicate a federal constitutional right. [Citations.]" (*Barco v. Tilton* (C.D.Cal. 2010) 694 F.Supp.2d 1122, 1136.) If a trial court's alleged instructional error violates only California law, the standard is that stated in *People v. Watson* (1956) 46 Cal.2d 818, 836, which permits the People to avoid reversal unless "it is reasonably probable that a

result more favorable to the appealing party would have been reached in the absence of the error." (*See People v. Simon* (1995) 9 Cal.4th 493, 506, fn. 11.)

C. Analysis

Here, it is highly questionable whether C.A. was liable to prosecution for the identical offense – murder – charged against the appellant in count 1. (§ 1111.) Even if C.A. was subject to such prosecution, the court's "failure to instruct on accomplice liability … is harmless if there was adequate corroboration of the witness." (*People v. Brown, supra,* 31 Cal.4th at p. 557.) As noted above, In June 2004, Lopez and appellant had a fight after appellant made some comments about the Ganas shooting. Lopez said he and appellant were drunk on tequila at the time. Lopez did not think that appellant was aware of his friendship with Ganas. Lopez was under the impression that appellant was visiting in Mexico, but appellant said he had done something wrong. Appellant went on to tell Lopez "[t]hat it was a car full of guys and then [appellant] shot …." Upon further questioning by the prosecutor, Lopez affirmed that the car was full of guys, and that appellant was the one who shot Ganas. In addition, Yrigollen immediately notified Madera police that appellant was in Mexico when she saw the advertisement in the Madera Tribune about the Ganas murder. The information that Yrigollen provided led to the apprehension of appellant.

Even if we assume that C.A. was an accomplice to the murder, the testimony of Michael Lopez corroborated the testimony of C.A., and it is not reasonably probable that a result more favorable to the appellant would have been reached had the court instructed sua sponte on the law of accomplice testimony pursuant to section 1111.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE EVIDENTIARY ERROR BY DENYING APPELLANT AN OPPORTUNITY TO IMPEACH A PROSECUTION WITNESS.

Appellant contends the trial court erroneously denied him an opportunity to impeach the testimony of Michael Lopez by excluding a statement by his sister, Luz Marie Kelly, during the defense case.

Appellant's sister was called as a defense witness, and she testified she knew Michael Lopez and often "hung out" with him prior to 2008. Appellant's trial counsel asked Kelly whether Lopez ever mentioned anything about appellant saying he shot George Ganas. Kelly responded, "Never." The prosecutor objected to the question on grounds that it called for hearsay. The trial court sustained the objection, struck Kelly's answer, and instructed the jury to disregard it. Appellant contends his counsel's testimony did not call for hearsay and was simply interposed to "set up impeachment of prosecution witness Michael Lopez.… Counsel wanted to impeach Lopez by offering evidence that Lopez never told Kelly that appellant confessed to him."

Respondent concedes the trial court's evidentiary ruling was erroneous because Evidence Code section 1220 defines hearsay as "evidence of a statement," and in this case the evidence at issue was "the *absence* of a statement." (Original italics.)

Evidence Code section 354 states:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that:
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> "(a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means;
>
> "(b) The rulings of the court made compliance with subdivision (a) futile; or

"(c) The evidence was sought by questions asked during cross-examination or recross-examination."

The rule of Evidence Code section 354 "is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 580-581.)

Respondent nevertheless properly contends the error was harmless under any standard because the answer had little probative value. (*People v. Hartsch* (2010) 49 Cal.4th 472, 497-498.) As respondent points out, "Logically, the fact that Lopez never told Ms. Kelly that appellant had admitted shooting Ganas says nothing about whether appellant actually did admit the shooting to Lopez. It may well be that Lopez chose not to tell Ms. Kelly, who was like a cousin, that her brother was a confessed murderer."

Although the trial court erroneously excluded Kelly's answer as hearsay, that evidentiary ruling did not constitute reversible error because the error complained of did not result in a miscarriage of justice.

III. DEFENSE COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO TESTIMONY OF A PROSECUTION WITNESS THAT SHE BELIEVED APPELLANT WAS ABOUT TO CONFESS TO HER IN JUNE 2004.

Appellant contends he was denied his constitutional right to the effective assistance of counsel when his counsel failed to object to the testimony of Virginia Yrigollen "that she believed appellant was about to confess to her when she told him to stop talking."

A. Yrigollen's Testimony

As noted above, Yrigollen testified that she lived with her boyfriend, Franco near Mexicali, Mexico in 2004. Their residence was about three and one-half miles from the U.S./Mexico border. She said her son, Lopez, visited occasionally, and that Franco was appellant's uncle. Both Yrigollen and Lopez testified that appellant goes by the nickname "Poncho." Yrigollen said appellant arrived at her home in June 2004 and

stayed about a month. Appellant would also stay at an aunt's house in the Mexicali area. Yrigollen said appellant's mother would come to Mexicali and leave money and groceries for appellant.

Yrigollen said she was a close friend of the mother of Ganas. Yrigollen had known Ganas his entire life and knew he had been shot in Madera. In June 2004, Yrigollen asked appellant about the Ganas shooting, but appellant said he did not remember much. Appellant claimed he had been at home when some friends stopped by to pick him up. Yrigollen said she stopped appellant from giving a explanation because she had a hard time believing his version of events. Yrigollen said she was shocked and upset and really did not want to know what had happened to Ganas. Yrigollen said appellant was making himself look bad by running and told him he should go back and clear matters up. Although appellant did not respond to her advice, Yrigollen said appellant looked at her and "he knew it needed to be done."

B. Appellant's Motion for New Trial

On September 9, 2010, appellant filed a motion for new trial (§§ 1179, 1181) and asserted that his trial counsel was ineffective by failing to object on Evidence Code section 352 grounds to the "entirely irrelevant" testimony of Virginia Yrigollen. He argued in his new trial motion: "The mere fact that [Yrigollen] thought that he was about to confess does not make the statement admissible. The meaning of the defendant's statement is ambiguous and should have been excluded." The trial court denied the new trial motion on that ground stating: "[T]he fact that she made a statement and then she said that she stopped, I don't find that to be unduly prejudicial, and I don't think that was subject to an objection at that point. She may have had some thoughts about what that meant, but the fact that she would not take further information meant that she didn't get further information, and that may have actually worked to the benefit of the defense. But I don't find prejudice in the statement as made on the record."

C. Law of Ineffective Assistance

According to appellant's opening brief, Yrigollen claimed that he confessed to her. He maintains that a timely objection by his trial counsel would have excluded testimony that "created a substantial danger of prejudice and confusion." To succeed on a claim of ineffective assistance of counsel, an appellant must show, first, that his trial counsel's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards, and second, that counsel's deficient representation caused him prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711.) To show prejudice, an appellant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been more favorable to the appellant. (*In re Emilye A., supra,* at p. 1711; *In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.)

" 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.] There are countless ways to provide effective assistance in any given case.' " (*People v. Lewis* (1990) 50 Cal.3d 262, 288, quoting *Strickland v. Washington, supra,* 466 U.S. at p. 689.) "[A]n ineffective assistance claim may be reviewed on direct appeal where 'there simply could be no satisfactory explanation' for trial counsel's action or inaction. [Citation.]" (*In re Dennis H., supra*, 88 Cal.App.4th at p. 98, fn. 1.)

D. Analysis

Appellant has failed to show deficient performance by trial counsel or prejudice in this case. Despite appellant's claims to the contrary, Yrigollen never expressly said that she thought appellant was about to confess to her. At most, the testimony was relevant to explain appellant's flight to Mexico after the shooting of Ganas and explained Yrigollen's conduct in contacting Crime Stoppers after seeing a newspaper article about the shooting of Ganas. Yrigollen said she asked appellant about the Ganas shooting in June 2004. At that time, appellant told Yrigollen he did not remember much. Yrigollen told appellant he was making himself look bad "running like this" and encouraged him to "go back, clear it up …." According to Yrigollen, appellant "looked at me. He knew … it needed to be done, you know." Even if trial counsel had interposed a timely, successful objection to Yrigollen's testimony, it is not reasonably probable a result more favorable to appellant would have occurred.

IV. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY SUA SPONTE ON VOLUNTARY MANSLAUGHTER BASED ON A SUDDEN QUARREL OR HEAT OF PASSION.

Appellant contends the trial court committed reversible error by failing to instruct sua sponte on voluntary manslaughter based on sudden quarrel or heat of passion.

A. Reported Instructional Conference

At the reported conference on jury instructions, trial counsel advised the court, "Your Honor, just to be specific, we're not requesting an instruction for voluntary manslaughter as a lesser included. I think that was what we discussed and wanted to put on the record." The prosecutor added that the defense was not asking for self-defense instructions because self-defense would be inconsistent with the defendant's theory of the case. Appellant's trial counsel concurred, saying, "That is correct, Your Honor. We're not requesting the instruction, and it would, in fact, be inconsistent with our theory."

B. Law of Invited Error

"When a defense attorney makes a 'conscious, deliberate tactical choice' to forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was omitted in error. [Citations.]" (*People v. Wader* (1993) 5 Cal.4th 610, 657-658.) In the context of voluntary manslaughter instructions, " 'the doctrine of invited error … applies if the court accedes to a defense attorney's tactical decision to request that lesser included offense instructions not be given' [citation] …." (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1330 (*Castaneda*).)

C. Analysis

Appellant claims the rule of *Castaneda* does not apply in his case because "trial counsel provided no tactical reason for not requesting instructions on voluntary manslaughter." Accepting appellant's contention as correct for purposes of this argument, the next question is whether sua sponte instructions on voluntary manslaughter were called for in this case.

"Voluntary manslaughter 'is the unlawful killing of a human being without malice,' committed 'upon a sudden quarrel or heat of passion.' (§ 192, subd. (a).) [T]o establish the crime of voluntary manslaughter, there must be evidence that (1) the defendant killed in the heat of passion, and (2) such passion would be aroused in an ordinarily reasonable person under the circumstances. [Citation.]" (*Castaneda, supra,* 51 Cal.4th at pp. 1330-1331.) " 'The provocation which incites a defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.' [Citation.] '[T]he victim must taunt the defendant or otherwise initiate the provocation.' [Citations.] The ' "heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances …." ' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

In this case, appellant claims the provocation consisted of bad looks and the throwing of a gang sign by Norteno gang members at the mini-mart. He also contends George Ganas walked "real slow" in front of Rodriguez's vehicle, acted tough, and placed his hands in his waistband, as if he were reaching for weapon. Such conduct falls short of taunting or the initiation of provocation, and any heat of passion engendered by Ganas's actions was not such passion "as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances." (*People v. Avila, supra,* 46 Cal.4th at p. 705.) The evidence was simply insufficient to justify a sua sponte instruction on voluntary manslaughter and reversal for instructional error is not required.

V. REVERSAL IS NOT COMPELLED BY ASSERTED CUMULATIVE ERROR.

Appellant contends the cumulative effect of errors committed at trial violated his right to due process of law under the 14th Amendment to the United States Constitution.

We have concluded that no prejudicial error occurred. Accordingly, there was no error to cumulate to appellant's prejudice. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Cudjo* (1993) 6 Cal.4th 585, 630.)

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Franson, J.